

Remarks

Minor amendments have been made to Claims 11, 14, 16, 18 and 19 to clarify those claims, correct typographical errors and insure proper dependency.

Turning to the art rejections, Claims 11-19 stand rejected as obvious over *Lerg, et al* (*Lerg*) in view of *Balzer* and *Bergmann, et al* (*Bergmann*) for the same reasons set forth in the prior Office Action. The rejection is, again, respectfully traversed. In response to the prior Office Action, the response being incorporated herein by reference for all purposes, applicant pointed out that *Lerg* expressly taught that the amount of water in the *Lerg* composition was limited to, at most, 3.5% by weight, which was to be compared with applicants' claims that require 20 to 95% by weight water. The Examiner's response to this argument is basically that because *Lerg* calls for a composition with much more oil, 30 to 45% by weight, versus applicants' claim, 0.1 to 20% by weight oil, the skilled artisan would have understood that the small amount of water permitted in *Lerg* was necessitated by the high oil content. This is a total reconstruction of the teachings of *Lerg* and contrary to the express reading of the *Lerg* patent. Under the law, the Examiner is not free to re-engineer the composition of *Lerg* by (a) decreasing the oil content and (b) increasing the water content, to arrive at applicants' claimed composition. Particularly is this true when it flies in the face of the *Lerg* invention. In col. 2, ll 24-28 *Lerg* teaches that the surprising feature of the invention are shower preparations that have a "markedly lower oil content." The crux of the *Lerg* invention is an oil content of between 30 to 45% wherein the water content is at most 3.5% by weight. Applicants' claims, on the other hand, call for 20 to 95% by weight water and from 0.1 to 20% by weight oil. The composition of *Lerg* and applicants' composition could hardly be further apart in their make-up. It is respectfully submitted that the Examiner is not relying on what the references would have

suggested to one of skill in the art but rather is relying on applicants' disclosure. This is classic hindsight analysis. How, for example, would the skilled artisan reading *Lerg*, and absent applicants' disclosure as a recipe, conclude that in *Lerg* the oil content could be dramatically lowered (to applicants' range) and the water content dramatically increased (to applicants' range) when the express teaching of *Lerg* is to the contrary? Over and above these dramatic differences between applicants' claims and the teachings of *Lerg, et al*, applicants' claims specifically call for a microemulsion and *Lerg* is silent as to emulsions or microemulsions.

Nor are the infirmities of *Lerg* cured by resort to *Balzer* and *Bergmann*. As was previously pointed out, *Balzer* does not teach the use of mono- or polyvalent C₂- C₂₄- alcohols. The alkylpolyglycosides (APG) of *Balzer* are not polyvalent C₂- C₂₄- alcohols. Furthermore, the composition of *Balzer* requires a presence of at least 80 weight percent APG, which is outside the scope of Claim 11, if it be assumed that all remaining components in applicants' composition were APG.

Once again, in attempting to combine *Balzer* and *Lerg* to arrive at applicants' claimed composition, the Examiner is engaging in hindsight. The Examiner is not free, absent some suggestion or motivation, to pick among the various disclosed components of *Lerg* and *Balzer* and then, using applicants' specification as a recipe, combine those components in the amount claimed by applicants to arrive at applicants' claimed composition. However, it is respectfully submitted that this is exactly what the Examiner has done. Over and above modifying *Lerg* in a manner totally inconsistent with the express teachings of *Lerg*, the Examiner has then cherry picked through *Balzer* in an attempt to arrive at applicants' claimed composition. It is respectfully submitted that all claims are patentable over *Lerg* in view of *Balzer*.

The *Bergmann* reference is also unavailing, combined with *Lerg* and/or *Balzer* to render applicants' claims unpatentable. As was previously pointed out, *Bergmann* is essentially the same as *Balzer*, save for the fact that triethanolamine salts of lauryl sulfate and lauryl ether sulfate are specifically mentioned among a myriad number of other compounds. However, none of those compounds are disclosed as part of a microemulsion but rather part of a composition comprising a cleansing surfactant to which the microemulsion may be added. In this regard, see col. 18, ll 34-46. Further, *Bergmann* is silent as to whether the cleaning composition includes an oil component, such as component (C) called for by applicants' Claim 11. As was the case of the combination of *Balzer* and *Lerg*, the Examiner's proposed combination of *Bergmann* and *Lerg* simply does not make out a *prima facie* case of obviousness. The Federal Circuit mandates prohibit reconstructing a reference, as the Examiner has done with respect to *Lerg*, and then attempting to cure any other remaining infirmities by using applicants' disclosure. It is respectfully submitted that all claims are patentable over the combination of *Lerg* and *Bergmann*.

Claims 11-19 also stand rejected as obvious over *Hermann* in view of *Balzer* and *Bergmann*, as per the prior Office Action. Like *Lerg*, *Hermann* teaches that the amount of water present must be kept low, e.g., not in excess of 15% by weight of the total composition. Indeed, when combined teachings of the *Lerg* and *Hermann* references point to the fallacy of the Examiner's position, that if the oil content is high simply lower the amount of water. While *Lerg* discloses 30 to 45% by weight oil and less than 3.5% water, *Hermann* discloses 20 to 60% by weight oil but up to 15% by weight water, i.e., nearly five times the amount that *Lerg* is acceptable for basically the same amount of oil. The reason *Bergmann* can tolerate much more water than *Lerg* is because *Lerg* and *Hermann* disclose different compositions. Further, the reason neither of those compositions can tolerate

applicants' claimed oil content is because they are different from applicants' claimed composition. In formulating the rejections based on *Lerg* and *Hermann* as being simply a function of more oil – less water, the Examiner has overlooked the fact that as between those two references there is a significant variation in the amount of water present, albeit that in both cases the oil content is high. This points to the fact that the Examiner must look at applicants' claims as a whole and the specific components delineated therein, in addition to oil and water. Viewed in that perspective, applicants' claims are not rendered obvious over *Lerg* or *Hermann*. As to the combination of *Hermann* with either *Balzer* and/or *Bergmann*, applicants' remarks above with respect to the combination of the secondary references with *Lerg* are equally applicable. It is respectfully submitted that all claims are patentable over *Hermann* in combination with either *Balzer* or *Bergmann*.

Applicants' also respectfully submit that Claims 18 and 19 are clearly patentable over all the references of record. There is no specific disclosure in any of the references of the composition of either Claim 18 or 19 nor any suggestion or motivation to arrive at such.

In view of the foregoing amendments and remarks, it is respectfully submitted that all claims are in condition for allowance, which is hereby earnestly solicited and respectfully requested.

Respectfully submitted,



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